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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of

MM Docket No. 00-167

Children's Television Obligations Of Digital Television Broadcasters

COMMENTS

OF THE

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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SUMMARY

What the Commission proposes in its *Notice* is nothing short of outright content regulation. It seeks comment on "steps" it might take to assure the "programs *do not contain* promotions for broadcast, cable, or theater movies or other age-inappropriate product promotions that are unsuitable for children to watch." Thus, the Commission has invited itself to the threshold of media content regulation.

The Motion Picture Association of America, Inc. ("MPAA"), respectfully submits that the Commission ought step back. The threshold confronting a Commission headed toward content regulation is high – and in this case likely insurmountable. Indeed, the Commission's proposals place the Commission on a collision course with its statutory mandate and the First Amendment.

The Communications Act contemplates no Commission involvement in the specific content of broadcast programming. First, Section 326 of the Communications Act imposes a barrier to any Commission action that forbids broadcast of particular program content. Second, the entire scheme of regulation engendered by the Communications Act dictates that the Commission abstain from program content regulation. In particular, it affords the Commission no authority to impose requirements that reflect the Commission's "private notions of what the public ought to hear."

The First Amendment also constrains Commission control over broadcast program content. Current modes of First Amendment analysis assure that the

Commission's proposals would encounter a hostile reception. For example, the Supreme Court now appears very skeptical of restraints even on supposedly "less-protected" *broadcast* content and even on *advertising*. Similarly, whereas the courts have permitted the Commission to protect children from *indecent* program material, the Commission's present proposals involve neither indecent nor obscene content. They focus on advertisements or promotions for upcoming television programming or motion pictures that are "unsuitable." Finally, courts have shown reluctance to consider depictions of violence as obscenity, which enjoys no protection under the First Amendment.

Furthermore, under current case law, judicial scrutiny of Commission regulation of broadcast advertising and promotion of upcoming television programs and theatrical motion pictures is likely to be more exacting than the Commission might now anticipate. For example, in striking down the federal statute prohibiting broadcast advertising of casino gambling, a plurality of the Court applied a test more akin to strict scrutiny. And when advertising consists of accurate and non-misleading information about lawful conduct, the Court has frowned on paternalistic restrictions that wrest decisions from advertisers and their audiences and places them in the hands of government. Indeed, the Court noted recently that "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." Lastly, because advertising and promotions for upcoming television programs and theatrical motion pictures promote a product that itself is subject to First Amendment protection, proposals like the

Commission's would be subject to more intense scrutiny than regulations governing advertisements for automobiles or beer.

The Commission's proposals also present unique aspects that invite judicial reprimand. For example, the Commission makes no effort to define the terms "unsuitable" or "inappropriate" or even to describe or define the specific types of sexual or violent content that it finds "unsuitable" or the language it finds "inappropriate." Developing such definitions plunges the Commission into the realm of the subjective and would be extraordinarily problematic constitutionally. Even a definition of "unsuitable" based on some existing criteria like the MPAA or other program ratings system never would survive First Amendment scrutiny. Decision after decision has recognized that MPAA's ratings system, for example, may not be embraced as a proxy for constitutional determinations. Furthermore, adoption of the motion picture, cable, or broadcast industry's ratings as part of a regulatory scheme would constitute an unconstitutional delegation of legislative power to a private group. Second, use of private industry ratings would invite patently ludicrous results. For example, were the Commission to ban advertisements for motion pictures rated PG13 or R for violence as unsuitable in programming with a significant child audience, advertisements for such socially and artistically acclaimed films as *Glory, Hamlet, Henry V, Schindler's List, Saving Private Ryan*, and *the Shawshank Redemption* would be banished from such programming.

The Commission's proposals also court judicial rebuke because they would deprive adults, as well as children, of information about upcoming television

programs and theatrical motion pictures. This sort of over inclusiveness has drawn judicial ire.

Finally, the Commission is in no position to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." First, the Commission has failed even to posit the harm it seeks to address. Second, any need for governmental action appears eclipsed by MPAA's well-established commitment to parents, its evolving understanding of parental concerns, and its whole-hearted embrace of voluntary action. Its motion picture rating system enjoys broad parental and governmental confidence and acclaim. MPAA also has responded to recent concerns about marketing of motion pictures with a 12-Point Initiative, portions of which address advertising and promotion of feature films. Third, the Commission offers no credible basis for finding that "unsuitable" advertisements and promotions about upcoming television programming and theatrical motion pictures appear in programming with a significant child audience.

MPAA, therefore, urges the FCC to refrain from pursuit of a regulatory response. Whereas the Commission's concern for the welfare of children – a sentiment shared mightily by MPAA – is admirable, it may follow its good intentions no farther than the boundaries of its legal authority. When the call is to regulate the content of broadcast programming (including advertising and promotions), the Commission must be fully alert to the limitations of its statutory mandate and the bar to government control of media content embedded in the First Amendment.

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In this proceeding, the Commission has invited itself to the threshold of media content regulation. It asks "Are there steps the FCC can take to ensure that programs designed for children or families do not contain promotions that are unsuitable for children to watch?"[1]

The Motion Picture Association of America, Inc. ("MPAA"), respectfully submits that the Commission ought step back. The threshold confronting a Commission headed toward content regulation is high – and in this case likely insurmountable. Indeed, when the Commission has stepped down the proverbial road

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[1] *Notice of Proposed Rule Making*, MM Docket No. 00-167, FCC 00-344 (released October 5, 2000) at ¶36 [hereinafter cited as *Notice*].

paved with good intentions, its radar must be acutely sensitive to the perimeter of its statutory authority and the barriers erected by the First Amendment to governmental control of broadcast station programming, advertising, and promotions. As then FCC Commissioner Glen Robinson so aptly observed:

> There is an especially seductive appeal to the idea of "protecting" children against television. There are areas where the prospect of governmental control of programming has only to be suggested to evoke opposition and antipathy. This is not one of them. It is with respect to children's television that our strongest instinct is to reach out and put the clamp of governmental control on programming. For this reason, regulation of children's programming raises the most subtle and the most sensitive problems.[2]

Therefore, the Commission must stand back and contemplate the clear message of current jurisprudence that places well-defined restraints on governmental dictation of broadcast content.

1. The Commission's Proposals to Adopt Regulations Governing Advertisements and Promotions About Upcoming Television Programming and Theatrical Motion Pictures Overstep Well-Established Limits on the Commission's Authority.

The Commission's *Notice* boldly and explicitly proposes content regulation.[3] It seeks comment on "steps" it might take to assure the "programs *do not contain* promotions for broadcast, cable, or theater movies or other age-inappropriate product

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[2] *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 37 (1974) (separate Statement of Commissioner Glen O. Robinson).

[3] The Federal Trade Commission recently acknowledged that any restriction on motion picture advertising would be a content-based restriction. Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-regulation and Industry Practices on the Motion Picture, Music Recording & Electronic Game Industries* (September 2000), Appendix C at 5 [hereinafter cited as *FTC Report*].

promotions that are unsuitable for children to watch."[4] Options mentioned by the Commission include mandatory rating and encoding of promotions "so they can be screened by V-chip technology" or so that "programs with a significant child audience contain only promotions consistent with the rating of the program in which they appear."[5] Thus, the Commission effectively proposes to ban certain promotions in certain programming. This may be starkly, but accurately, described as censorship. It also proposes to mandate rating of promotions. This may be considered nothing short of compelled speech. As such, the Commission's proposals place the Commission on a collision course with its statutory mandate and the First Amendment.

A. Under the Communications Act of 1934 Commission censorship of broadcast programming is anathema.

The Communications Act contemplates no Commission involvement in the specific content of broadcast programming. As the Supreme Court has recognized, "the government's power over licensees ... is by no means absolute and is carefully circumscribed by the Act itself."[6]

First, Section 326 of the Communications Act imposes a barrier to any Commission action that forbids broadcast of particular program content.[7] Second, the entire scheme of regulation engendered by the Communications Act dictates that the

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[4] *Notice* at ¶36 [emphasis supplied].

[5] *Notice* at ¶36.

[6] *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 126 (1972).

[7] 47 U.S.C. §326.

Commission abstain from program content regulation. The Act strictly limits the Commission to oversight of broadcast licensees' "overall performance under the public interest standard." [8] This limited scope of oversight provides no "power to ordain any particular type of programming that must be offered by broadcast stations."[9] It also affords the Commission no authority to impose requirements that reflect the Commission's "private notions of what the public ought to hear."[10]

Third, Section 551 of the Telecommunications Act of 1996 provided the Commission no authority to develop a ratings system applicable to advertisements and promotions for upcoming television programs and theatrical motion pictures. Section 551(b)(1), which included a contingent grant of authority to adopt ratings for television *programs* never became effective. Furthermore, the Commission approved the *TV Parental Guidelines* with the explicit recognition that the *TV Parental Guidelines* required no ratings of individual advertisements and promotions.[11]

Thus, the Commission draws authority from a statutory scheme that prohibits its either banning or compelling speech (including ratings). The Commission's

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[8] *CBS v. DNC, supra,* 412 U.S. at 120.

[9] *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2463 (1994). Some might suggest erroneously that the Commission's "requirement" that stations broadcast at least three hours of core educational children's programming per week illustrates the propriety of content-based programming requirements. First, the "three hour rule" is not a "requirement." It is a processing guideline. Stations remain free to show compliance with their obligations to serve the educational and informational needs of children in other ways. *Children's Television Programming*, 11 FCC Rcd 10660 (1996). Second, even the Commission's processing guidelines remain untested in court.

[10] *Id.*

[11] *Report and Order,* CS Docket 97-55, FCC 98-35 (releansed March 13, 1998) at ¶21.

proposals to mandate ratings and ban "inappropriate" promotions, therefore, are completely out of synch with this statutory regime.

B. The First Amendment places stringent limits on commission regulation of broadcast content.

No less than its empowering statute, the First Amendment also constrains Commission control over broadcast program content – *including* advertising and promotions.[12] Indeed, current modes of First Amendment analysis assure that the Commission's proposals would encounter a hostile reception. For example, the Supreme Court recently struck down a statutory ban on broadcast casino advertising.[13] Therein the Court enunciated a "presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and non-misleading information about lawful conduct."[14] Thus, the Court appeared very skeptical of restraints even on supposedly "less-protected" *broadcast* content and even on *advertising*. Furthermore, because the Commission's proposals are content-based – they single out for distinct treatment only advertising and promotions for upcoming television programs and theatrical motion pictures that contain "unsuitable" content –, judicial scrutiny would be most exacting.[15]

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[12] That the Commission's proposals address entertainment programming is of no constitutional moment. The First Amendment protects speech "designed to entertain as well as to inform." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952).

[13] *Greater New Orleans Broadcasting Association v. United States*, 119 S. Ct. 1923 (1999) [hereinafter cited as *GNOBA*].

[14] *Id.*, 119 S. Ct. at 1935-36.

[15] *Turner Broadcasting System v. FCC, supra,* 512 U.S. at 641-643. Some might suggest that the Commission's proposals are no more than time, place, or manner restrictions

Even the Commission's authority to protect children from harmful speech on broadcast television must conform to established bounds of constitutionally allowable government involvement in specific program content. First, the courts have permitted the Commission to confine *indecent* program material to a late-night safe harbor when few children are presumed to be still awake, much less watching television.[16] However, the Commission's present proposals involve neither indecent nor obscene programming, advertising, or promotions. They focus on advertisements or promotions for upcoming television programming or motion pictures that are "unsuitable."[17] That the Court once allowed the Commission to prevent the unexpected intrusion of "offensive, indecent material" into the privacy of the home also is unavailing.[18] Again, the Commission has made no suggestion that advertisements and promotions for upcoming television programs and theatrical motion pictures contain indecent material. Thus, given the Commission's limited leeway under the First Amendment to protect children from the intrusion of or access to *indecent* program content, regulation of content that is merely "unsuitable" has no place in the Commission's rule book.

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on advertising and promotions for upcoming television programs and theatrical motion pictures. However, the intermediate level of analysis applicable to time, place, and manner restrictions on speech would not apply. This lesser level of scrutiny applies only to content-neutral regulations. *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

[16] *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996).

[17] *Notice* at ¶35. Such advertisements might be considered unsuitable if they contained "sexual or violent content or inappropriate language." *Id.* They also might be considered unsuitable because the program or motion picture advertised contained "sexual or violent content or inappropriate language." *Id.*

Third, the latitude under the First Amendment allowing regulation of violence-provoking speech hardly extends to depiction of violence in advertising and promotions for upcoming television programs and theatrical motion pictures. Only speech inciting the listener to "imminent lawless action" is unprotected.[19] Courts also have shown reluctance to consider depictions of violence as obscenity, which enjoys no protection under the First Amendment.[20]

Therefore, the Commission's authority to regulate advertising and promotions for upcoming television programs and theatrical motion pictures – markedly attenuated by the First Amendment – falls short of empowering the Commission to condemn certain material as unsuitable and ban it from certain programming, including children's programming.

2. Current First Amendment Jurisprudence Suggests a Particularly Unfriendly Environment for Commission Regulation of Advertising and Promotions for Upcoming Television Programs and Theatrical Motion Pictures.

Evolving tenets of First Amendment jurisprudence concerning regulation of advertising also suggest that the Commission's proposals exceed its authority.

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[18] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[19] *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

[20] *See, e.g., Video Software Dealers Ass'n v. Webster*, 968 F. 2d 684, 688 (8th. Cir. 1992). Even the one decision that extended the concept of obscenity to include graphic violence available to children in video games took pains to distinguish television programs and motion pictures. *Am. Amusement Mach. Ass'n v. Cottey*, No. IP00-1321-C-H/G, 2000 U.S. Dist. LEXIS 15076, ____ F. Supp. ____ (S.D. Ind. October 11, 2000).

A. The Court has greeted restrictions on commercial speech with growing skepticism.

Recent case law indicates that restrictions on advertising – commercial speech – will come under more demanding judicial scrutiny. Traditionally, restrictions on commercial speech have been subject only to so-called intermediate scrutiny.[21] However, the Court appears at least on the verge of abandoning or restricting application of intermediate scrutiny of commercial speech restrictions. In a more recent case, a plurality of the Court has stated that deferential application of the *Central Hudson* intermediate scrutiny test no longer was the law.[22] Thus, in striking down the federal statute prohibiting broadcast advertising of casino gambling, a plurality of the Court applied a test more akin to strict scrutiny.[23] Therefore, judicial scrutiny of Commission regulation of broadcast advertising and promotion of upcoming television programs and theatrical motion pictures is likely to be more exacting than the Commission might now anticipate.

B. The Court has expressed disfavor with paternalistic rationales for government restrictions on advertising.

Commissioner Tristani has stated that the Commission has "no higher obligation and no greater task" than, *inter alia*, limiting the availability of age-inappropriate content during children's programming.[24] Perhaps with an eye towards

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[21] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

[22] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509-510 (1996).

[23] *GNOBA*, 119 S. Ct. at 1934.

[24] *Notice*, Separate Statement of Commissioner Gloria Tristani.

such an impetus to well-motivated government actions, the Supreme Court has exhibited a growing disdain for paternalistic restrictions on advertising. When advertising consists of accurate and non-misleading information about lawful conduct, the Court has frowned on restrictions that wrest decisions from advertisers and their audiences and place them in the hands of government.[25] As stated in a compelling fashion by a plurality of the Court in *44 Liquormart*, "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[26] Therefore, the Commission must consider the constitutional limitations on its power with special care when its intentions are good. The Commission's desire to placate parental concerns about "unsuitable" promotions and advertisements for upcoming television programs and theatrical motion pictures may have superficial appeal. But that appeal necessarily vanishes in the harsh glare of a First Amendment scrutiny increasingly suspicious of paternalistic motives for government restrictions on advertising.

C. Judicial Scrutiny Is Especially Intense When the Advertised Product Is Itself Protected by the First Amendment.

Advertising and promotions for upcoming television programs and theatrical motion pictures likely would be considered "pure speech" rather than commercial

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[25] *GNOBA*, 119 S. Ct. at 1935-1936.

[26] 517 U.S. at 503 (plurality). And these more recent pronouncements only echo the Court's sentiment, expressed nearly 25 years ago in the first case according protection to commercial speech. There the Court rejected the notion that "a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976).

speech, which is subject to lesser protection under the First Amendment.[27] They enjoy a critical distinction – that of advertising or promoting a product that itself is subject to First Amendment protection.[28] And they often include some portion of the content of the program or motion picture they promote. Thus, proposals like the Commission's would be subject to more intense scrutiny than regulations governing advertisements for automobiles or beer.[29]

3. Difficulties Inherent in Regulation of Broadcast Advertising and Promotions of Upcoming Television Programs and Theatrical Motion Pictures Assume Constitutional Dimension.

The Commission's proposals also present unique aspects that invite judicial reprimand.

A. Permissible Definitions of terms like "inappropriate" and "unsuitable" defy rational construction.

The Commission seeks comment on proposals to restrict advertising and promotions for upcoming television programming and theatrical motion pictures out of concern "that they may be unsuitable for children to watch because either the promotions themselves or the programs they refer to contain sexual or violent content or inappropriate language."[30] The Commission makes no effort to define the terms "unsuitable" or "inappropriate" or even to describe or define the specific types of

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[27] *See, e.g., Board of Trustees v. Fox,* 492 U.S. 469, 477 (1989); *see also Bolger v. Young Drug Prods. Corp. supra,* 463 U.S. at 64-65.

[28] *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968) ("Motion pictures are, of course, protected by the First Amendment.").

[29] *See also Bolger v. Young Drug Prods. Corp. supra,* 463 U.S. at 60.

sexual or violent content that it finds "unsuitable" or the language it finds "inappropriate." The Commission undoubtedly pulls up short because developing such definitions not only tend to be subjective, but also extraordinarily problematic constitutionally. As observed by Commissioner Powell:

> The NPRM asks, for example, whether "unsuitable" promotions should be banned during children's programming. I am skeptical that we can, or should, make this subjective determination.[31]

Indeed, under a First Amendment regime that confers less protected status only on indecent, obscene, and very limited sorts of violent expression, the Commission likely would be unable to craft a permissible, objective definition that would survive constitutional scrutiny.

The perils of subjective definitions are obvious. They are vague – an infirmity of constitutional dimension. In no way would they "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" or "provide explicit standards for the [Commission]."[32] Moreover, their inherent tendency to chill speech would render them impermissible under the First Amendment.[33] Indeed, concepts of "suitability" with respect to motion pictures have met with judicial rebuke.[34]

Even a definition of "unsuitable" based on some existing criteria like the MPAA or other program ratings system never would survive First Amendment

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[30] *Notice* at ¶35.

[31] *Notice*, Separate Statement of Commissioner Michael K. Powell.

[32] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[33] *Reno v. ACLU*, 521 U.S. 844, 871-872 (1997); *see also Smith v. California*, 361 U.S. 147, 151 (1959) ("stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech....").

scrutiny. First, no private industry ratings systems may serve as a basis for the operation of government regulation of advertising and promotions for upcoming television programs and theatrical motion pictures. These ratings mechanisms are meant only as informational tools to assist parents in selecting programming and films for their children. Even then, for example, the MPAA ratings system makes no determination that films rated "PG," "PG-13," or "R" are rated for adults. They simply indicate to parents that parental guidance or accompaniment for persons under 17 might be in order. Furthermore, private ratings are neither designed nor able to draw distinctions between advertising and promotions for upcoming television programs and theatrical motion pictures that are constitutionally protected and those that are not. Indeed, decision after decision has recognized that MPAA's ratings system may not be embraced as a proxy for constitutional determinations.[35] Furthermore, adoption of the motion picture, cable, or broadcast industry's ratings as part of a regulatory scheme would constitute an unconstitutional delegation of legislative power to a private group.[36] Therefore, the Commission's proposals would invite judicial condemnation to the extent they look to private ratings systems like MPAA's to determine the regulatory status of advertising and promotions for upcoming television programs and theatrical motion pictures.

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[34] *Interstate Circuit*, 390 U.S. 676 (1968).

[35] *See, e.g., Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wis. 1995); *Desilet ex rel. Desilet v. Clearview Regional Board of Education*, 630 A. 2d 333 (N.J. Super. Ct. Ap. Div. 1993, *aff'd*, 647 A. 2d 150 N.J. 1994).

[36] *See A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935)

Second, use of private industry ratings would invite patently ludicrous results. For example, were the Commission to ban advertisements for motion pictures rated PG13 or R for violence as unsuitable in programming with a significant child audience, advertisements for such socially and artistically acclaimed films as *Glory, Hamlet, Henry V, Schindler's List, Saving Private Ryan*, and *the Shawshank Redemption* would be banished from such programming.

Third, drawing lines between the suitable and unsuitable based on the purpose or context of depictions of violence or sexual activity still would leave the Commission mired in impermissible subjective determinations. For example, government ratings of films as "not suitable" when they described or portrayed "brutality, criminal violence or depravity in such manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency" was held unconstitutionally vague and subjective.[37] Similarly, a definition of violence that depended on the perceived context and purpose of the film was insufficiently definite and, therefore, unconstitutionally vague.[38]

Therefore, the Commission's reliance on essentially subjective criteria would doom its proposals from the outset.

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[37] *Interstate Circuit, supra,* 390 U.S. at 682.

[38] *Video Software Dealers Ass'n v. Webster, supra,* 968 F. 2d 684, 687; *see also Reno v. ACLU, supra,* 521 U.S. at 871-874.

B. Depriving adults of desirable information about television programming and theatrical motion pictures would be unavoidable.

The Commission's proposals also court judicial rebuke because they would deprive adults, as well as children, of information about upcoming television programs and theatrical motion pictures. This sort of over inclusiveness has drawn judicial ire. For example, the Court struck down a law limiting exposure of minors to sexually indecent communications because it also limited the ability of adults to access the same material. The Court found it improper to "reduce the adult population to only what is fit for children." [39] This is precisely what the Commission proposes, however – eradication of "unsuitable" advertisements and promotions about upcoming television programming and theatrical motion pictures from television programming viewed by adults as well as children.

C. A record demonstrating the need for or benefits of regulation appears unattainable.

The First Amendment demands much of the government when it proposes to restrict speech:

> When the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[40]

The Commission's proposal is utterly deficient under such a standard.

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[39] *Reno v. ACLU*, 521 U.S. at 875.

[40] *Turner Broadcasting System, Inc. v. FCC*, *supra*, 512 U.S. at 664.

(1) The Commission has failed to define the harm its proposals might address.

The Commission has failed even to posit the harm it seeks to address. Its *Notice* alludes to no harm that might flow from exposing children to "unsuitable" advertisements and promotions about upcoming television programming and theatrical motion pictures. One might conjure up some superficially appealing rationales, but this task falls squarely on the Commission. Until such time as it elects to honor the public with some explanation of the harm it seeks to address with its proposals, no one can begin to address whether the harm is real.

Indeed, in the absence of a defined and demonstrably real harm to be addressed by the Commission's proposal, any evaluation of whether its proposal would cure the harm is impossible. The Court's insistence that even the supreme court of a state explain its decisions fully and coherently leaves no doubt that the Commission would fare poorly before a reviewing court evaluating its proposals.[41]

(2) The established history of industry self-regulation and, indeed, recent actions that address specific concerns raised by the Commission in this proceeding demonstrate that government action is unwarranted.

Voluntary action has been a hallmark of MPAA for over three decades. Indeed, MPAA long ago assumed a position of leadership in promoting and implementing voluntary actions responsive to parental concerns. First, the MPAA motion picture ratings system epitomizes successful voluntary action and demonstrates the motion picture industry's commitment to respond to parents'

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[41] *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. __ (per curiam)(2000).

concerns.[42] As MPAA President and CEO Jack Valenti recently reminded Congress, for *nearly 32 years*, the purely *voluntary* movies rating system has offered advance cautionary warnings to parents about individual films so that parents can make their own decisions about the movies they want their children to see or not to see. [43]

By all accounts, MPAA's motion picture ratings system has been a success. The categories as defined by the MPAA and the National Association of Theater Owners are well recognized and understood across the United States.[44] Indeed,

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[42] The motion picture industry's self-regulatory system includes a substantive review and pre-approval of advertising. For a film to use the MPAA rating system, all advertising materials for a film, including television and radio commercials, print advertising, Web-sites, and trailers (previews shown in theaters) must be approved by the Advertising Administration which is funded through fees collected by CARA for the rating of films. MPAA rules require that a film's letter rating be displayed in all advertising. The FTC found that the Advertising Administration generally achieves this goal. *FTC Report* at 8.

[43] Testimony of Jack Valenti, President and CEO of the Motion Picture Association of America, before the U.S. Senate Committee on Commerce, Science and Transportation Hearing on the FTC Report on Marketing Practices (September 13, 2000).

[44] These well-known categories include:

G – General Audiences – All ages admitted,

PG – Parental Guidance Suggested – Some material may not be suitable for children,

PG-13 – Parents Strongly Cautioned – Some material may be inappropriate for children under 13,

R – Restricted – Under 17 requires accompanying parent or adult guardian (age varies in some jurisdictions), and

NC – No one 17 and Under Admitted.

The Classification and Ratings Administration ("CARA") which is operated separately from and independent of the operations of the MPAA, determines the ratings based on what they think most American parents would consider appropriate for viewing by children based on theme, language, nudity and sexual content, violence, drug use, and other relevant matters. In addition, the CARA offers a brief explanation for each film's rating for all films other than G rated films, *e.g.*, "Rated R for terror, violence and language," or "Rated PG-13 for intense sci-fi violence, some sexuality and brief nudity."

parents have embraced the MPAA rating system. To assure its continued responsiveness and usefulness to parents, MPAA has been monitoring parents' reactions to movie ratings via annual surveys. The most recent survey revealed an "all-time high in parental endorsement" with 81% of all parents with children under 13 judging the current rating system to be "Very Useful" to "Fairly Useful" in helping them to choose the films they want their children to see. [45] Indeed, a recent Federal Trade Commission Report confirmed that a high percentage of parental familiarity with the movie rating system and noted the large majority of parents who find the ratings helpful.[46] The FTC went so far as to state that the MPAA movie rating system "has remained intact for more than 30 years and is well-established with the American public."[47]

Second, this fall MPAA and its member companies have taken additional voluntary actions and initiatives to address concerns about marketing of motion pictures. As part of a 12-Point set of Initiatives, MPAA's member companies agreed to:

The MPAA also maintains an explanation of its ratings system on its own Web sites www.mpaa.org and www.cara.org with search link to the reasons for a particular movie's rating, *e.g.*, language, violence, nudity, sex, and drug use. MPAA participated in the establishment of another site for like information is www.filmratings.com which is devoted entirely to providing rating information on all rated movies, including the reasons for the rating on recent releases.

[45] The most recent survey was conducted by the Opinion Research Corporation of Princeton, New Jersey, and was completed in early September of this year.

[46] *FTC Report* at 3.

[47] *FCT Report* at 6.

- Review their marketing and advertising practices in order to further the goal of not inappropriately specifically targeting children in advertising of films rated R for violence; and

- Appoint a senior executive compliance officer or committee to review on a regular basis the company's marketing practices in order to facilitate the implementation of the initiatives.

The Initiatives also commit MPAA to review annually how each member company is complying with the Initiatives. Thus, Mr. Valenti will meet at least once every two months with the various compliance teams. The teams will supervise a series of changes in the way movies are marketed, including more detailed ratings explanations in ads and movie trailers. The first meeting with the newly installed marketing compliance teams from the seven major studios and DreamWorks was held November 15, 2000.

In such circumstances, any need for governmental action appears eclipsed by MPAA's well-established commitment to parents, its evolving understanding of parental concerns, and its whole-hearted embrace of voluntary action.[48] As Mr. Valenti testified, "[O]ver a span of three decades and more, the movie industry has been attentive to the needs of parents than any other enterprise in the United States."[49]

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[48] MPAA notes that the Federal Trade Commission, largely in light of First Amendment concerns and existing self-regulatory efforts by MPAA, has expressed a strong preference for continued self-reguation rather than governmental intervention. *See* Letter of November 20, 2000, to the Honorable John McCain, Chairman, Committee on Commerce, Science, and Transportation, United States Senate, from the Honorable Robert Pitofsky, Chairman, Federal Trade Commission.

[49] Valenti Testimony at 3. MPAA also exerted its leadership in the field of informing parents about content of broadcast (and cable) television programming. MPAA was heavily involved in the development of the rating system used to implement V-Chip screening of television programming. Again the Commission approved the industry ratings system – *The*

(3) The Commission cites no evidence to support the existence of a problem.

The Commission offers no credible basis for finding that "unsuitable" advertisements and promotions about upcoming television programming and theatrical motion pictures appear in programming with a significant child. As Commissioner Powell observed:

> I am troubled by the fact that we have not established, as a threshold matter, that a serious problem exists in this area. There is little, if any, empirical data in the record to substantiate the conclusion that unsuitable promotions are being aired during children's programming.[50]

Thus, when all is said and done, the Commission may find itself jousting at windmills – again, something disallowed when restrictions on speech are involved.

4. Conclusion

MPAA, therefore, urges the FCC to refrain from pursuit of a regulatory response. Whereas the Commission's concern for the welfare of children – a sentiment shared mightily by MPAA – is admirable, it may follow its good intentions no farther than the boundaries of its legal authority. When the call is to regulate the content of broadcast programming (including advertising and promotions), the

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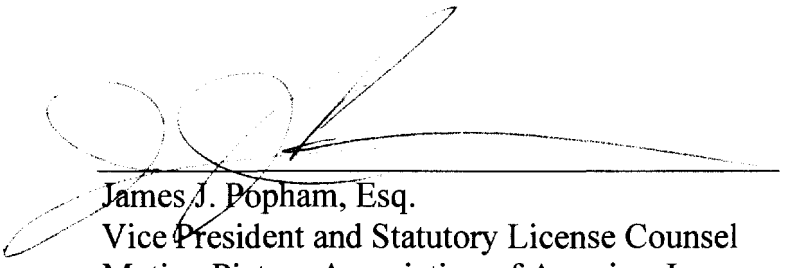
TV Parental Guidelines – even though they do not require rating of promotional announcements for programs. *Report and Order*, *supra*.

[50] *Notice*, Separate Statement of Commissioner Michael K. Powell.

Commission must be fully alert to the limitations of its statutory mandate and the bar to government control of media content embedded in the First Amendment.

Respectfully submitted,



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December 18, 2000

CERTIFICATE OF SERVICE

I, Jo P. Popham, hereby certify that I have caused copies of the foregoing "Comments of the Motion Picture Association of America, Inc." to be sent via By-Hand delivery, this 18th day of December, 2000, to the following:

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Commissioner Michael K. Powell
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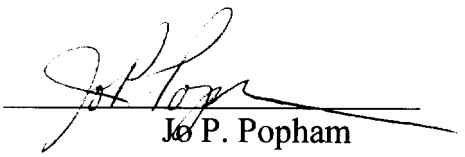

Jo P. Popham